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In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA and ITS LOCALS 2100, 2101, 2108 and 2110,
Petitioners,

vs.

HARRY E. BECK, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation* is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights.

*Landmark Legal Foundation recently changed its name from Gulf and Great Plains Legal Foundation.

The Foundation, through original action litigation and amicus curiae briefs, has fervently supported the right of individuals to freely exercise their First Amendment beliefs to support or oppose the political philosophy of their choice. Moreover, the Foundation has strenuously opposed state and federal governmental restrictions on and hindrances to the free enterprise system and the economic rights of individuals.

Landmark, as Gulf and Great Plains, has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this case.

SUMMARY OF ARGUMENT

The terms of the National Labor Relations Act (NLRA) reflect the intent of Congress to preserve the right of workers to bargain collectively through a union bargaining agent. That is the central purpose of the NLRA. It follows that agency fees charged to nonunion workers by the Communications Workers of America, based on a union security arrangement authorized by the NLRA, may not be used by that union for activities beyond collective bargaining. The legislative history of the NLRA indicates that Section 8(a)(3) of that Act is to be applied in the same manner as Section 2, Eleventh of the Railway Labor Act (RLA). The RLA has consistently been interpreted by this Court to proscribe the use of agency fees for activities not related to collective bargaining. It is inconsistent with the will of Congress to interpret the NLRA differently than the RLA. Under

the NLRA, the Communications Workers of America may not collect union dues from nonunion workers, based on a union security arrangement, for purposes other than collective bargaining.

The First Amendment rights to free speech and association limit governmental authority to prohibit or compel an individual's participation in or support of a particular political ideology. A labor union which, pursuant to a federal statute, compels nonunion workers to financially support its political activities unconstitutionally burdens the free speech rights of those nonunion workers.

This compulsion thrust upon nonunion workers constitutes governmental action. In effect, the NLRA serves as the source of the power, wielded by unions, to compel financial support of a political ideology through the union security arrangement. Such arrangements are clearly a boon to labor unions, and the statutory authorization of such arrangements, as in Section 8(a)(3) of the NLRA, would undoubtedly act as a powerful incentive for unions to utilize them. The federal statute is the source of power giving rise to the infringement of free speech rights, and it would encourage private actors, labor unions, to carry out the constitutional infringement. Governmental action, then, would be present if the Communications Workers of America were allowed to compel nonunion employees to support its political activities through a union shop agreement. The union would be using a federal statute, the NLRA, as a predicate for violating the First Amendment rights of nonunion workers.

Employees in the communications industry who exercise their right of free choice and opt not to join the

Communications Workers of America may not constitutionally be forced to subsidize, with compulsory agency fees, the political ideology of that labor union under a collective bargaining agreement made pursuant to the NLRA. To require a nonunion worker to subsidize the political activities of the Communications Workers of America, under threat of dismissal from employment, would constitute an egregious infringement on those workers' First Amendment right to free speech and association.

ARGUMENT

I.

THE FOURTH CIRCUIT COURT OF APPEALS CORRECTLY INTERPRETED THE NATIONAL LABOR RELATIONS ACT TO PROHIBIT, BY ITS TERMS, THE COMMUNICATIONS WORKERS OF AMERICA FROM REQUIRING NONUNION EMPLOYEES, AS A CONDITION OF EMPLOYMENT, TO FINANCE IN PART UNION ACTIVITIES UNRELATED TO COLLECTIVE BARGAINING.

On its face the National Labor Relations Act (NLRA) proscribes the use of agency fees contributed by nonunion workers for any purpose other than collective bargaining. The NLRA provides that the policy of the Act is aimed at protecting the right to collective bargaining. 29 U.S.C. §151. The Act defines a "labor organization" as an entity that exists to deal with employers concerning grievances, disputes, pay, hours and conditions, all of which fall within the realm of collective bargaining. 29 U.S.C. §152(5). Moreover, the NLRA provides that union

bargaining representatives are "for the purposes of collective bargaining." 29 U.S.C. §159(a). The clear intent of Congress, from the explicit terms of the NLRA, was to allow employees to choose a collective bargaining agent. The central theme of the statute is collective bargaining.

The union security arrangement is sanctioned by Section 8(a)(3) of the NLRA. Given the intent of Congress to protect the right of employees to bargain collectively under the NLRA, it stretches logic and good sense to argue that Section 8(a)(3) allows agency fees of nonunion employees to be expended for any purpose beyond collective bargaining. Under the NLRA, the role of the labor union is to be played out at the bargaining table. Compelling nonunion employees to subsidize any union activities unrelated to collective bargaining contravenes not only the spirit and purpose of the NLRA, but also its express terms.

Section 8(a)(3) allows a union security agreement under which employment may be conditioned upon union membership. This Court has held, however, that membership "has been whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). As a result, nonunion employees cannot, under the NLRA, be forced to pay for any more than their share of collective bargaining expenses. Their membership obligations extend no further than the requirement that they reimburse the union agent for costs incurred in that capacity. The Court of Appeals in this case was correct when it concluded that Section 8(a)(3) had been violated by a union engaging in the exaction of union dues from non-consenting nonunion employees under an agency

contract beyond the requirements for purposes of collective bargaining, grievance adjustment or contract administration. . . ." *Beck v. Communications Workers of America*, 800 F.2d 1280, 1281 (4th Cir. 1986) (en banc).[1]

The Railway Labor Act (RLA) governs labor relations involving railway and airline workers. Section 2, Eleventh of the RLA allows union security agreements to be contained in collective bargaining contracts which are subject to the RLA. 45 U.S.C. §152, Eleventh. The Act was amended in 1950 to add the provision authorizing the union security arrangement. The terms of the amended RLA are "substantially the same as those of the [NLRA] as they have been administered." S. Rep. No. 2262, 81st Cong., 2d Sess. 3 (1950).

Thus, the legislative history of the RLA indicates that the 1950 amendments were intended to afford railroad and airline employees the same collective bargaining rights as workers in other industries, including those industries whose labor relations are governed by the NLRA. Three Senators reserved the right to amend the RLA security agreement provisions so that application of the RLA would be in "general accord [with the union security] conditions of employees of other industry."[2] *Id.* at 4. Congress clearly intended the parallel provisions

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1. The Fourth Circuit also found this unlawful exaction of union dues constituted a breach of the union's duty of fair representation. This duty is defined as an obligation of the union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

2. The three Senators included Senator Taft. In 1947 he had sponsored and co-authored the Taft-Hartley Act. This legislation authorized the union shop arrangement in collective bargaining contracts subject to the NLRA.

of the RLA and NLRA to be applied in the same fashion. Consequently, Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA are virtually identical in purpose and effect.

This Court has repeatedly held that the RLA restricts union expenditure of agency fees to the costs of collective bargaining. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). These cases represent a consistent interpretation of the RLA to proscribe the use of agency fees paid by nonunion workers to promote the political ideology of the union. In *Street*, the Court observed: "One looks in vain for any suggestion that Congress also meant in §2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." 367 U.S. at 764. The net effect of *Street*, and its progeny, is to proscribe the use of agency shop fees for political activities over the objections of employees.[3]

Section 8(a)(3) of the NLRA requires the same construction as that given Section 2, Eleventh of the RLA in the *Street* line of decisions. The legislative history of the RLA clearly indicates that it was to be "substantially the same" in application as the NLRA. For this Court to be faithful to the intent of Congress, the NLRA must be interpreted to restrict the use of agency fees to union activities related to collective bargaining, and, consequently, to prohibit the use of agency fees for political activities.

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3. *See* Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 65-76 (1983).

II.

COMPULSORY AGENCY FEES CHARGED TO NONUNION EMPLOYEES BY THE COMMUNICATIONS WORKERS OF AMERICA, PURSUANT TO A UNION SECURITY ARRANGEMENT AUTHORIZED BY SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT, MAY NOT CONSTITUTIONALLY BE USED BY THE UNION REPRESENTATIVE FOR THE PROMOTION OF POLITICAL AND IDEOLOGICAL CAUSES.

Under a union security arrangement, labor unions are allowed to require nonunion employees to pay the equivalent of union dues to the union in return for the benefits derived from having a bargaining representative. Both the NLRA and the First Amendment permit this compulsion as a solution to the "free-rider problem." Beyond collective bargaining, however, there is no compelling governmental interest, such as the "free-rider problem," in impinging nonunion workers' First Amendment rights to free speech and association. Therefore, any compulsion of nonunion employees to financially support union activities which are not related to collective bargaining constitutes an abridgement of those workers' First Amendment rights.

A. The Exaction Of Agency Fees From Nonunion Employees By The Communications Workers Of America Under A Union Security Arrangement Constitutes Governmental Action.

The union bargaining agent derives the authority to compel the payment of union dues or agency fees from the National Labor Relations Act. This compulsion constitutes governmental action in that "the federal statute

is the source of the power and authority by which any private rights are lost or sacrificed." *Railway Employee's Dept. v. Hanson*, 351 U.S. 225, 232 (1956). The Act represents the implementation of a congressionally designed labor policy. *Havas v. Communications Workers of America*, 509 F. Supp. 144, 148 (N.D.N.Y. 1981). As such, the Act serves to encourage labor unions to enter into union shop agreements pursuant to Section 8(a)(3) of the NLRA.

The union shop arrangement is clearly advantageous to the labor union. It not only allows the union to act as the exclusive bargaining representative, but forces employees to join the union, or at least pay agency fees, under the threat of dismissal. This type of agreement allows the representative union to collect financial support from all affected employees, including those who choose not to join the union. The union security arrangement, therefore, greatly strengthens a particular union at the local level and the labor movement in general. Given Section 8(a)(3)'s authorization, labor unions will enter into union shop agreements whenever possible because such agreements make unions more powerful through self-perpetuation. It is unrealistic to contend that the federal government, through the NLRA, does not encourage union shop arrangements—and compelled payment of agency fees—within collective bargaining agreements.

Moreover, the use of agency fees by a labor union for purposes other than collective bargaining is a judicially cognizable activity on constitutional grounds because a federal statute, the NLRA, encourages the activity which gives rise to the constitutional infringement. *See Reitman v. Mulkey*, 387 U.S. 369, 375, 380-81 (1967); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Without question,

"[g]overnmental action is infused in the NLRA." *Havas*, 509 F. Supp. at 148. *See Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); *Lykins v. Aluminum Workers*, 510 F. Supp. 21 (E.D. Pa. 1980). *But see Price v. International Union*, 795 F.2d 1128 (2d Cir. 1986); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983). Concerning Section 2, Eleventh of the RLA, which has the same purpose and effect as Section 8(a)(3) of the NLRA, this Court has concluded that "the enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal action." *Hanson*, 351 U.S. at 232.

The Court recognized in *Hanson* that although the union shop or agency shop agreement is between private parties, the federal government is the source of authority by which unions may infringe upon the First Amendment rights of workers through the union security arrangement. The First Amendment prevents labor unions from using the NLRA as a club with which to bludgeon the free speech rights of employees.[4]

B. The Use Of Agency Fees Paid By Nonunion Employees To Support Union Political Activities Unrelated To Collective Bargaining Is Tantamount To Compelled Subsidization Of The Union's Political Ideology.

The First Amendment protects the individual citizen's right to free speech and association. The government may

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4. The existence of the requisite governmental action can also be maintained based on the union's position as the exclusive bargaining agent. "The representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations." *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198 (1944). *See J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

not prevent a person from associating with a particular group or force an individual to join a particular group. A member of this Court recently noted that "the right to be free from compelled associations is found in our conviction that individuals may not be forced to join or support positions or views which they find objectionable on moral, ideological, or personal grounds." *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 297 (1984) (Brennan, J., dissenting).

If, under a union security agreement pursuant to provisions in the NLRA, a labor union is allowed to expend agency fees collected from nonunion workers for union activities other than collective bargaining, then the First Amendment rights of those nonunion workers are in jeopardy. Labor unions spend enormous sums of money to promote their political ideology. The CWA claims that it has the right to spend its funds, including the agency fees of nonunion workers, on any activity it wishes, even those promoting its political ideology. Petitioners have argued that the NLRA authorizes labor unions to compel nonunion workers to subsidize union political causes. This compelled subsidization is proscribed by the First Amendment.

This Court has previously held that public employees may not constitutionally be compelled to subsidize the political ideology of their union representative under the guise of an agency shop arrangement. *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). This Court has also held that, under the RLA, railway workers may not constitutionally be compelled to subsidize the political ideology of their union representative based on a union security arrangement. *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). *See International Ass'n of*

Machinists v. Street, 367 U.S. at 768 (the authority to impose dues and fees restricted to the "extent of denying the union the right, over the employee's objection, to use his money to support political causes which he opposes").

The same First Amendment protections against compelled subsidization of a political ideology must be afforded to workers whose labor relations are governed by the NLRA. Like public employees, communications workers should not be coerced into financially supporting political activities with which they disagree under the threat of losing employment. *See Abood,* 431 U.S. at 236. Like unions in the railroad industry, the CWA must spend funds collected through an agency shop agreement only on "activities germane to collective bargaining." *See Railway Clerks v. Allen,* 373 U.S. 113, 122 (1963). Any government-sanctioned compulsion beyond that constitutes a violation of nonunion workers' rights to free speech and association in that they would be "captive to ideas, associations and causes espoused by others." *Seay v. McDonnell Douglas Corp.,* 427 F.2d 996, 1004 (9th Cir. 1970).[5]

Compelled subsidization of a political ideology is a clear violation of the First Amendment, a violation which goes to the very heart of this constitutional safeguard. Thomas Jefferson once wrote that to compel an individual "to furnish contributions of money for the propagation of opinions with which he disbelieves . . . is sinful and tyrannical." It is also unconstitutional. One group may not, with the authorization of a federal statute, coerce another

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5. The infringement cuts two ways. Not only is the nonunion worker made captive to the ideology of the labor union, but the portion of his paycheck which is taken by the union reduces the worker's ability to financially promote political causes which he does support. *Seay,* 427 F.2d at 1004.

group into financing its political beliefs and convictions. Unions may not, therefore, constitutionally use agency fees for political activities over the objections of nonunion employees.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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